



8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 CHRISTYANNA POHLMANN, an
12 individual,
13 Plaintiff,
14 v.
15 CAROLYN W. COLVIN, Acting
16 Commissioner of Social Security,
17 Defendant.

Case No.: 3:16-CV-00700-MMA-KSC

**REPORT AND
RECOMMENDATION RE CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

[Doc. Nos. 16, 20]

18 Pursuant to Title 42, United States Code, Section 405(g), of the Social Security Act
19 ("SSA"), plaintiff filed a Complaint to obtain judicial review of a final decision by the
20 Commissioner of Social Security ("Commissioner") denying her disability insurance
21 benefits.¹ Pursuant to Title 28, United States Code, Section 636(b)(1)(B), and Civil Local
22 Rules 72.1(c)(1)(c) and 72.2(a), this matter was assigned to the undersigned Magistrate
23

24
25 ¹ Title 42, United States Code, Section 405(g), provides as follows: "Any individual, after any final
26 decision of the Commissioner of Social Security made after a hearing to which he was a party ... may
27 obtain a review of such decision by a civil action ... brought in the district court of the United States....
28 The court shall have power to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying or reversing the decision of the Commissioner of Social Security, with or without
remanding the cause for a rehearing. The findings of the Commissioner ... as to any fact, if supported by
substantial evidence, shall be conclusive."

1 Judge for a Report and Recommendation.

2 Presently before the Court are: (1) plaintiff's Motion for Summary Judgment [Doc.
3 No. 16]; (2) defendant's Cross-Motion for Summary Judgment [Doc. No. 19];
4 (3) defendant's Response in Opposition to Plaintiff's Motion [Doc. No. 20]; (4) plaintiff's
5 Reply to defendant's Opposition [Doc. No. 21]; and (5) the Administrative Record [Doc.
6 No. 9.]. After careful consideration of the moving and opposing papers, as well as the
7 Administrative Record and the applicable law, this Court **RECOMMENDS** that the
8 District Court remand the case for further consideration by the Commissioner pursuant to
9 the "fourth sentence" of Section 405(g) and enter a final judgment. *Melkonyan v. Sullivan*,
10 111 S.Ct. 2157 (1991); *Sullivan v. Finkelstein*, 110 S.Ct. 2658 (1990).

11 **I. Background and Procedural History.**

12 On March 24, 2014, plaintiff filed an application for a period of disability and
13 disability insurance benefits ("DIB") alleging disability beginning January 1, 2011. [AR
14 155-156.] Plaintiff's application states that she was born on July 29, 1979. She said in her
15 application she was unable to work due to (1) severe migraines; (2) depression; (3) post-
16 traumatic stress disorder ("PTSD"); (4) Unilateral Pars Defect in her spine; and (5) stress
17 incontinence. [AR 98.] On May 21, 2014, the Commissioner denied plaintiff's application
18 for DIB. [AR 92-94.] Plaintiff requested reconsideration on July 14, 2014 [AR 95], but
19 her request was denied on October 20, 2014. [AR 98-102.] On October 31, 2014, she
20 requested a hearing before an administrative law judge (hereinafter "ALJ"). [AR 103-104.]
21 A hearing before an administrative law judge was held on May 27, 2015. [AR 35-64.]

22 On September 16, 2015, the ALJ issued a written opinion concluding that plaintiff
23 did not qualify for DIB under the SSA. [AR 21-30.] In reaching this decision, the ALJ
24 found that plaintiff has the severe impairments of "history of pars defect at L5-S1 of the
25 lumbar spine; history of migraine headaches; history of herniated disc thoracic spine;
26 alcohol dependence; and depression/mood disorder." [AR 23.] However, the ALJ
27 concluded she did not have an impairment or combination of impairments that meet SSA
28 disability criteria and, as a result, would have the residual functional capacity to perform a

1 full range of light work with no sustained interaction with supervisors, coworkers and the
2 public. [AR 23-28.]

3 On November 13, 2015, plaintiff requested review of the ALJ's decision by the
4 Appeals Council. [AR 15-17.] However, on January 27, 2016, the Appeals Council denied
5 plaintiff's request for review. [AR 1-3.]

6 **II. Standards of Review.**

7 The final decision of the Commissioner must be affirmed if it is supported by
8 substantial evidence and if the Commissioner has applied the correct legal standards.
9 *Batson v. Comm'r of the Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).
10 Under the substantial evidence standard, the Commissioner's findings are upheld if
11 supported by inferences reasonably drawn from the record. *Id.* If there is evidence in the
12 record to support more than one rational interpretation, the District Court must defer to the
13 Commissioner's decision. *Id.* Substantial evidence means "such relevant evidence as a
14 reasonable mind might accept as adequate to support a conclusion." *Osenbrock v. Apfel*,
15 240 F.3d 1157, 1162 (9th Cir. 2001). The Court must weigh both the evidence that supports
16 and detracts from the administrative ruling. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
17 1999).

18 Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary
19 judgment if the movant shows that there is no genuine dispute as to any material fact and
20 the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "Summary
21 judgment motions, as defined by Fed.R.Civ.P. 56, contemplate the use of evidentiary
22 material in the form of affidavits, depositions, answers to interrogatories, and admissions.
23 In Social Security appeals, however, the Court may 'look no further than the pleadings and
24 the transcript of the record before the agency,' and may not admit additional evidence.
25 *Morton v. Califano*, 481 F.Supp. 908, 914 n. 2 (E.D.Tenn.1978); 42 U.S.C. § 405(g).
26 "[A]lthough summary judgment motions are customarily used [in social security cases],
27 and even requested by the Court, such motions merely serve as vehicles for briefing the
28

1 parties' positions, and are not a prerequisite to the Court's reaching a decision on the
2 merits." *Kenney v. Heckler*, 577 F.Supp. 214, 216 (D.C. Ohio 1983).

3 **III. Medical Evidence.**²

4 **A. Disability Determinations by the Department of Veterans Affairs.**

5 The record includes medical records from the Department of Veterans Affairs
6 indicating that plaintiff was a veteran of the Gulf War Era and that she served in the Navy
7 from December 19, 2000 to March 1, 2006. [AR 153.] The record contains three disability
8 rating decisions from the Department of Veterans Affairs. [AR 484-497, 498-505,
9 506- 523.]

10 In a decision dated April 19, 2013, from the Department of Veterans Affairs,
11 plaintiff's overall service connected disability rating was 100%. [AR 486.] The
12 Department of Veterans Affairs' decision was based on an overall assessment of plaintiff's
13 service connected conditions. [AR 485-486.] Plaintiff's service connected disability for
14 her sciatic nerve in her left and right legs with pars defect L5-S1 (sometimes also referred
15 to as a "unilateral pars defect L5-S1") was increased from 10% to 20%, effective October
16 30, 2012. [AR 484-486, 491-92.] Plaintiff's service connected disability for her major
17 depressive disorder was increased from 50% to 70%, effective October 30, 2012. *Id.*
18 Plaintiff's service connected condition of migraine headaches was found to be 30%
19 disabling. [AR 486.]

20 In a decision dated November 26, 2013, from the Department of Veterans Affairs,
21 plaintiff received a determination that her "stress incontinence" was 60% disabling. [AR
22 498-503.] The "reasons for decision" were as follows: (1) plaintiff was required to wear
23 "absorbent materials which must be changed more than four times per day;" (2) plaintiff

24
25 ² The instant dispute concerns only whether the ALJ properly evaluated and/or addressed plaintiff's
26 overall service connected disability rating from the Department of Veterans Affairs. [Doc. No. 16, at pp.
27 6-17; Doc. No. 20-1, at pp. 6-16; Doc. No. 21, at p. 3.] Accordingly, a summary of plaintiff's disability
28 determinations by the Department of Veterans Affairs are summarized herein. The Court refers to
specific evidence from the record where pertinent to the Court's analysis in the Discussion section of
this Order.

1 was waking up “to void five or more times per night;” and (3) plaintiff’s “daytime voiding
2 interval [was] less than one hour.” [AR 503.]

3 In a decision dated March 3, 2014, from the Department of Veterans Affairs,
4 plaintiff’s overall service connected disability rating remained at 100%. [AR 148.]
5 However, her disability rating for her evaluation of migraine headaches was increased from
6 30 percent disabling to 50 percent disabling, effective October 30, 2012. [AR 153-154.] In
7 its determination, the Veterans Administration states:

8 Evaluation of migration headaches, which is currently 30 percent
9 disabling, is increased to 50 percent effective October 30, 2012, the date
10 we received your claim based on continuous prosecution. The overall
11 disability picture demonstrates a level of functional impairment that
12 more approximates that which is contemplated in the 50 percent
13 evaluation criteria. An evaluation of 50 percent is assigned for very
14 frequent, completely prostrating, and prolonged attacks productive of
15 severe economic inadaptability.

16 At the VA exam, you reported migraines 3-5 times per week with nausea,
17 vomiting, changes in vision, and photo and phone sensitivity. The
18 examiner noted there is evidence of very frequent prostrating and
19 prolonged attacks of migraine headache pain, [sic] You reported missing
20 48 days from school in the past 12 months due to migraine headaches.

21 [AR 154.]

22 ***B. May 27, 2014 Hearing Before the ALJ.***

23 ***1. Plaintiff’s Testimony.***

24 At the hearing, plaintiff testified that she was 35 years old, and had completed some
25 college. [AR 38.] She testified that she had three children, two of whom lived with her. *Id.*
26 Plaintiff testified that regarding her history with drug or alcohol problems, she had one
27 “DUI” in 2013 but “since then [she hasn’t] used alcohol.” [AR 38; AR 48.] She also
28 testified that she was using medical marijuana, but she had abstained from using it for the
last month. [AR 38; AR 48.]

1 At the hearing, the ALJ noted as follows: “You’re 100 percent VA disability, and
2 you’ve got SSDI here. What is that?” [AR 39.] Plaintiff explained that she was originally
3 approved for Social Security Disability, but then she filed an appeal regarding the date of
4 onset. *Id.* Plaintiff said that she was currently receiving disability benefits, but understood
5 that she may have to repay them. *Id.*

6 Plaintiff testified that she earned a pharmacy technician certification in 2013. [AR
7 39-40.] She said that in obtaining the certification, she “had many absences due to [her]
8 illnesses,” but the school worked with her to help her graduate. *Id.* Plaintiff testified that
9 she was in the Navy for six years. During that time, she was stationed in Camp Pendleton
10 as a hospital corpsman, and she also did many field operations with the Marines. [AR 40-
11 41.] She testified that left the Navy on a pregnancy discharge because she was “going
12 through [her] divorce and pregnant with [her] third child.” [AR 40.]

13 The ALJ asked plaintiff about what medications she took on a daily basis, noting
14 that she had “quite a few pain meds” listed on her medical records. [AR 40.] Plaintiff
15 testified that she took them “all every day for [her] back and/or [her] migraines.” *Id.* The
16 ALJ asked plaintiff when she started having physical problems. *Id.* Plaintiff testified that
17 she “was first diagnosed with the migraines when [she] was in boot camp which was in
18 March of 2001.” [AR 41.] She further testified that she injured her back in approximately
19 2002, and then it just progressively became worse after that when they eventually
20 discovered she had a fracture referred to as pars defect. *Id.* The ALJ asked plaintiff about
21 how she fractured her back, and plaintiff said that she was not sure. *Id.* Plaintiff further
22 explained that she is “pretty petite, and [she] was having to carry pretty heavy packs,” so
23 it may have been the stress on her back from that. *Id.* She also noted that she has a herniated
24 disc in her back. *Id.* The ALJ asked plaintiff how she got the herniated disc, and plaintiff
25 said that she was not sure. *Id.* She explained generally that “[t]he military was pretty rough
26 on [her] body.” *Id.*

27 The ALJ asked plaintiff how she cares for her two children, and plaintiff explained
28 that she “get[s] help a lot of the time.” [AR 41.] Plaintiff testified that she receives help

1 with her children from the following people: (1) a caregiver/friend named Shanna Dodson;
2 (2) a neighbor, Steve Millot; (3) plaintiff's mother; and (4) her children's sports coaches
3 with transporting them to activities. [AR 41.] Plaintiff explained that she "spends many
4 days in bed so it's tough." *Id.* Regarding her migraines, plaintiff testified that at the time
5 of the hearing, she was experiencing them daily. *Id.* Plaintiff said that she used to get
6 migraines about three to five times a week, but then approximately six or seven months
7 ago, she started experiencing them daily. *Id.* Plaintiff further testified that her migraines
8 began around the time of her enlistment with the Navy and that she had to miss a lot of
9 duty. [AR 43.] She said that her migraine medications generally prevent her from driving
10 because it causes her photosensitivity, and it can also make her irritable, constipated, and
11 nauseous. *Id.* When the ALJ asked plaintiff whether the migraines were the most serious
12 issue she has, she said that "it's a tie between that and [her] back." *Id.*

13 Regarding her back pain, plaintiff testified that she had not had an MRI since she
14 was on active duty when they discovered her herniated disc. [AR 44.] She testified that she
15 had asked her doctor for it, but they denied it. *Id.* However, she explained that she had an
16 appointment with neurology one month after the hearing "to explore the option of getting
17 an MRI and also some type of pain injections in her back." *Id.* Regarding medical issues
18 that affect plaintiff's ability to work other than migraines and back problems, plaintiff
19 testified that she had PTSD, depression, anxiety, and stress incontinence. [AR 44.] Plaintiff
20 explained that the medication that she takes for depression "helps a small bit" and that she
21 would "rather take it than not take it." [AR 46.]

22 When the ALJ asked plaintiff what she does during the day, she said that she spends
23 almost every day in bed. *Id.* The ALJ asked her whether she did that every day, and
24 plaintiff said yes, "some days it's hard to even shower." *Id.* When the ALJ asked plaintiff
25 whether she does any physical exercise, she said "very seldomly." [AR 47.] She said that
26 she sometimes tries to go for a walk, but then she ends up in more pain. *Id.* Plaintiff
27 testified that in the past she has belonged to a gym, in order to walk on the treadmill, and
28 for the tanning and massage services. *Id.* The ALJ asked plaintiff how recently she went

1 to the gym. *Id.* Plaintiff said that she went to the gym “last week just to get on the treadmill
2 and try to get a little exercise because the doctors have said that if I can try to get a little
3 movement it’s better than nothing. . . . But I’m usually not getting more than few minutes
4 on the treadmill before it starts to really bother my lower back.” *Id.* at 47-48.

5 After the ALJ finished his initial examination of plaintiff, plaintiff’s attorney
6 questioned her. Plaintiff’s attorney asked her about the disability rating(s) she received
7 from the Department of Veterans Affairs. [AR 49.] Plaintiff testified that her disability
8 rating was for her sciatica, headaches, tinnitus, stress incontinence (which she believed was
9 listed as chronic cystitis), depression, and her back issues. [AR 49-50.] Plaintiff’s attorney
10 asked her how long her disability rating from the Department of Veterans Affairs has been
11 at 100 percent. [AR 50.] Plaintiff testified that she has been at 100 percent disability rating
12 since 2012. *Id.* Plaintiff’s attorney asked her about whether she has experienced difficulty
13 with fainting episodes. *Id.* Plaintiff testified that she has had several fainting episodes and
14 that they happen every four to six months. *Id.* She testified that she does not know what
15 causes the fainting, but she “tie[s] it to [her] migraines.” *Id.* Plaintiff also testified that
16 since 2013, she has been getting Botox injections for the headaches every ten to twelve
17 weeks, which help “take the edge off for a few weeks.” *Id.* at 50-51. Regarding her work
18 history, plaintiff testified that her last full time job was in June 2009, and then she had a
19 consistent part-time job until January 2011, when she was fired for having migraines and
20 calling out sick. *Id.* at 51.

21 The ALJ then asked plaintiff details of her work history, starting with her
22 employment with Fairway Enterprises as an administrative assistant for a physical therapy
23 office from August 2007 until June 2009. [AR 52.] She said she left the job “because of
24 difference of view with [her] boss and her threatening to fire [her] over [her] migraines.”
25 [AR 52.] At J.C. Penney, plaintiff worked as a shoe associate; then she was an
26 administrative assistant for Braden Partners LP, Pacific Pulmonary Services. [AR 52.] She
27 also worked at San Diego Digestive Services, where she did “check out and scheduling of
28 patients.” [AR 53.] She also worked early on in her career at Macy’s and subsequently at

1 Money Mailer. The ALJ asked plaintiff why she wanted to be a pharmacy technician and
2 get out of the medical assistant role. [AR 55.] Plaintiff said she wanted to try something
3 new and was still entitled to military benefits to go to school. *Id.* However, plaintiff
4 explained that in pharmacy technician school, she was required to go to school four hours
5 a day, but she missed a lot of school due to her migraines. *Id.*

6 The ALJ also asked plaintiff about her “stress incontinence.” [AR 60.] Plaintiff
7 mentioned that she starting using pads for it in 2006, after the delivery of her third child.
8 [AR 61.] The ALJ asked plaintiff whether she received any medication for it, and plaintiff
9 said she did not. *Id.* Plaintiff testified during the hearing that:

10 It’s just a little confusing to me because I was – I’m 100 percent disabled
11 through the VA, and when I originally did my application for Social
12 Security benefits I was approved. We went to appeal the date of onset
13 because they had changed my date of onset, and that’s when they came
14 back saying that I was overall denied. So that’s just a little confusing to
15 me that they would right off the bat say, ‘Yes, you’re disabled. We agree
16 with the VA,’ and then come back and change their decision.

17 [AR 62.]

18 The ALJ responded that “there’s several levels of review in these files. . . I don’t
19 know what their rationale was.” [AR 62-63.] The ALJ noted that the details of plaintiff’s
20 reapplication were “not on [his] cover sheet” “[s]o somebody didn’t delve into that.” [AR
21 63.] The ALJ said that he will “take a look at that also.” *Id.*

22 The ALJ said that he was going to order plaintiff to be examined by an internal
23 medicine physician, which will include her orthopedic problem. [AR 63.] He also noted
24 he was going to order plaintiff to get a psychiatric clinical exam. *Id.*

25 **2. Vocational Expert’s Testimony.**

26 Mr. Stock, a vocational expert, answered two hypothetical questions posed by the
27 ALJ. First, Mr. Stock testified that plaintiff could not perform any of her past work in light
28 of plaintiff’s age, education, prior work experience, and her restriction “to a light range of
work, no work on unprotected heights, no work on dangerous machinery, no ladders,
occasional stairs and ramps, occasional stopping and bending, occasional lifting above

1 shoulder level, no sustained, intense interaction with the public, coworkers, or
2 supervisors.” [AR 57-58.] Mr. Stock opined that plaintiff could perform other work
3 including a mail clerk, laundry worker, or silver wrapper. [AR 58.]

4 The second hypothetical question posed by the ALJ included the same restrictions
5 as the first hypothetical, but also provided that the person would have to be restricted to a
6 sedentary range of work. [AR 58.] The vocational expert opined that plaintiff could
7 perform the following work with these restrictions: (1) a leaf tier; or (2) a press clippings
8 cuttings-paster.” *Id.*

9 **IV. The ALJ’s Five Step Disability Analysis.**

10 To qualify for disability benefits under the SSA, an applicant must show that he or
11 she is unable to engage in any substantial gainful activity because of a medically
12 determinable physical or mental impairment that has lasted or can be expected to last at
13 least 12 months. 42 U.S.C. § 423(d). The Social Security regulations establish a five-step
14 sequential evaluation for determining whether an applicant is disabled under this standard.
15 20 CFR § 404.1520(a); *Batson v. Comm’r of the Social Security Admin.*, 359 F.3d at 1193-
16 1194.

17 At step one, the ALJ must determine whether the applicant is engaged in substantial
18 gainful activity. 20 CFR § 404.1520(a)(4)(I). “Substantial gainful activity is work activity
19 that is both substantial and gainful.” 20 CFR § 416.972. Here, the ALJ concluded plaintiff
20 had not engaged in substantial gainful activity since January 1, 2011, the alleged onset date
21 of plaintiff’s alleged impairments. [AR 23.]

22 At step two, the ALJ must determine whether the applicant is suffering from a
23 “severe” impairment within the meaning of Social Security regulations. 20 CFR
24 § 404.1520(a)(4)(ii). “An impairment or combination of impairments is not severe if it
25 does not significantly limit [the applicant’s] physical or mental ability to do basic work
26 activities.” 20 CFR § 404.1521(a). For example, a slight abnormality or combination of
27 slight abnormalities that only have a minimal effect on the applicant’s ability to perform
28 basic work activities will not be considered a “severe” impairment. *Webb v. Barnhart*, 433

1 F.3d 683, 686 (9th Cir. 2005). Examples of basic work activities include walking, standing,
2 sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking,
3 understanding, carrying out and remembering simple instructions, use of judgment,
4 responding appropriately to supervision, co-workers and usual work situations, and dealing
5 with changes in a routine work setting. 20 CFR § 404.1521(b)(1)-(6). “If the ALJ finds
6 that the claimant lacks a medically severe impairment, the ALJ must find the claimant not
7 to be disabled.” *Webb v. Barnhart*, 433 F.3d at 686.

8 Here, at step two, the ALJ concluded that plaintiff has the following severe
9 impairments: history of a pars defect at L5-S1 of the lumbar spine; history of migraine
10 headaches; history of herniated disc thoracic spine; alcohol dependence; and
11 depression/mood disorder. [AR 23.] The ALJ also found that these impairments “cause
12 more than minimal limitations on the claimant’s ability to perform basic work activities.”
13 *Id.*

14 If there is a severe impairment, the ALJ must then determine at step three whether it
15 meets or equals one of the “Listing of Impairments” in the Social Security regulations.
16 20 CFR § 404.1520(a)(4)(iii). If the applicant's impairment meets or equals a Listing, he
17 or she must be found disabled. *Id.* In this case, the ALJ concluded at step three that
18 plaintiff’s impairments or combination of impairments did not meet or equal a listed
19 impairment. [AR 23.] As a result, the ALJ concluded plaintiff was not disabled based on
20 medical considerations alone. *Id.*

21 If an impairment does not meet or equal a Listing, the ALJ must make a step four
22 determination of the claimant's residual functional capacity based on all impairments,
23 including impairments that are not severe. 20 CFR § 404.1520(e), § 404.1545(a)(2).
24 “Residual functional capacity” is “the most [an applicant] can still do despite [his or her]
25 limitations.” 20 CFR § 404.1545(a)(1). The ALJ must determine whether the applicant
26 retains the residual functional capacity to perform his or her past relevant work. 20 CFR
27 § 404.1520(a)(4)(iv).

1 If the applicant cannot perform past relevant work, the ALJ—at step five—must
2 consider whether the applicant can perform any other work that exists in the national
3 economy. 20 CFR § 404.1520(a)(4)(v). While the applicant carries the burden of proving
4 eligibility at steps one through four, the burden at step five rests on the agency. *Celaya v.*
5 *Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). The ALJ must consider all of plaintiff’s
6 medically determinable impairments, including any pain that could “cause a limitation of
7 function” and any impairments that were not “severe,” and then determine plaintiff’s
8 residual functional capacity to perform other work in the national economy. 20 CFR
9 §§ 404.1520; 404.1545; 416.929. “In determining [the claimant’s] residual functional
10 capacity, the ALJ must consider whether the aggregate of [the claimant’s] mental and
11 physical impairments may so incapacitate him that he is unable to perform available work.”
12 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997), as *amended on reh’g* (Sept.
13 17, 1997). As noted above, “residual functional capacity” is “the most [an applicant] can
14 still do despite [his or her] limitations.” 20 CFR § 404.1545(a)(1).

15 Here, the ALJ acknowledged at step four that plaintiff was unable to perform any
16 past relevant work. [AR 28.] Considering the totality of plaintiff’s symptoms and pain,
17 the ALJ concluded at step five that plaintiff has the residual functional capacity to make a
18 “successful adjustment to other work that exists in significant numbers in the national
19 economy.” [AR 29.] The ALJ cited the vocational expert’s testimony regarding
20 representative occupations for plaintiff including, for example, (1) mail clerk; (2) domestic
21 laundry worker; (3) silver wrapper; (4) leaf tier; (5) addresser; or (6) press clippings
22 cutter/paster. *Id.* In reaching this determination, the ALJ concluded that plaintiff is “not
23 disabled” under the framework of Medical-Vocational Rule 202.21. *Id.*

24 The ALJ considered the testimony of the vocational expert and plaintiff’s age,
25 education, work experience, and residual functional capacity. [AR 28]. In addition, the
26 ALJ specifically considered plaintiff’s testimony regarding “migraine headaches,
27 depression and PTSD since 2001, a unilateral pars defect, and stress incontinence.” [AR
28 25.] However, the ALJ reasoned that plaintiff’s “statements concerning the intensity,

1 persistence and limiting effects of her symptoms” were “not fully credible.” *Id.* The ALJ
2 cited other objective medical evidence in the record, including plaintiff’s disability findings
3 by the Department of Veterans Affairs, which he found “fail[ed] to provide strong support
4 for the claimant’s allegations of disabling symptoms and limitations.” *Id.* Regarding the
5 disability findings by the Department of Veterans Affairs, the ALJ noted as follows:

6 A decision by any agency about disability is based on that agency’s rules
7 and is not binding on the Social Security Administration (20
8 C.F.R. 404.1504 and 416.904). Accordingly, although I considered the
9 medical findings and related treatment within the VA records, I accord
 the disability ratings from the VA agency no weight.

10 [AR 25.]

11 **V. Discussion.**

12 **A. Substantial Evidence Standard.**

13 In her Motion for Summary Judgment, plaintiff argues that the Court should reverse
14 the ALJ’s decision and award benefits, because the ALJ failed to articulate “persuasive,
15 specific and valid reasons” for rejecting the VA’s disability rating. [Doc. No. 16, at pp. 8-
16 9.] Defendant argues that the Court should affirm the ALJ’s decision because the ALJ
17 adequately considered the VA’s disability ratings and disability decisions by other agencies
18 are not binding upon the Commissioner. [Doc. No. 22-1, at pp. 2-8.]

19 It is well established in the Ninth Circuit that “an ALJ must ordinarily give great
20 weight to a VA determination of disability.” *Valentine v. Commissioner Social Security*
21 *Administration*, 574 F.3d 685, 695 (9th Cir. 2009) (quoting *McCartey v. Massanari*, 298
22 F.3d 1072, 1076 (9th Cir. 2003) (reversing a denial of benefits because the ALJ “failed to
23 consider the VA finding and did not mention it in his opinion”)). [A]lthough a VA rating
24 of disability does not necessarily compel the SSA to reach an identical results, 20 CFR
25 § 404.1504, the ALJ must consider the VA’s finding in reaching his decision.” *McCartey*,
26 298 F.3d at 1076. In reaching this holding, the Ninth Circuit relied on “the marked
27 similarity between these two federal disability programs. Both programs serve the same
28 governmental purpose – providing benefits to those unable to work because of a serious

1 disability. *Both programs evaluate a claimant's ability to perform full-time work in the*
2 *national economy on a sustained and continuing basis; both focus on analyzing a*
3 *claimant's functional limitations; and both require claimants to present extensive*
4 *medical documentation in support of their claims."* *Id.* (emphasis added). However,
5 because the criteria for determining disability are not identical, "the ALJ may give less
6 weight to a VA disability rating if he gives persuasive, specific, valid reasons for doing so
7 that are supported by the record." *Id.*

8 In *Valentine*, the VA rated plaintiff 100 percent disabled while his case was pending
9 before the ALJ. 574 F.3d at 694. Notwithstanding the VA's disability rating, the Ninth
10 Circuit court found that the ALJ provided "specific and legitimate reasons that [were]
11 supported by substantial evidence in the record" to reject the VA's disability rating. *Id.* at
12 695. The Ninth Circuit court noted that the ALJ specifically stated in her opinion that "the
13 VA's determination was not based on a comprehensive evaluation of the evidence available
14 to [her]." *Id.* The court concluded that "the acquisition of new evidence or a properly
15 justified reevaluation of old evidence constitutes a persuasive, specific, and valid reason
16 . . . supported by the record." *Id.* (internal citation omitted).

17 Similarly, in *Davis v. Astrue*, No. 10cv1732-BEN-NLS, 2011 WL 3740365, at *9
18 (S.D. Cal. July 29, 2011), the court affirmed the ALJ's decision that the claimant could
19 perform sedentary work notwithstanding his VA disability rating of 100% because "the
20 ALJ independently addressed and assessed the evidentiary basis for the VA rating as
21 required." (internal citation omitted). The court reasoned:

22 The ALJ explicitly mentioned the 100 percent disabled rating when
23 issuing his decision and noted that disability ratings between the two
24 agencies do not necessarily have the same meaning. The ALJ provided
25 a specific example of John McCain, who is 100 percent disabled
26 according to the VA, but has proven to be capable of performing work.
27 Here, while Plaintiff's VA disability rating is 100 percent, according to
28 the ALJ he is capable of performing sedentary work, which is the lowest
exertional level of work as defined by the SSA. While the ALJ cannot
reject the VA rating solely because the SSA and VA's governing rules
differ, the difference in rules was not the sole basis of the rejection. The

1 ALJ reviewed the evidentiary basis for the VA's rating and addressed it
2 three times in his order. . . . [T]he ALJ appropriately considered the VA
3 rating and gave persuasive, specific and valid reasons for affording less
weight to the VA's determination of disability."

4 *Id.* (internal citation omitted).

5 It is insufficient for an ALJ to impliedly reject a VA disability rating on the basis
6 that the VA and SSA criteria for determining disability are not identical. *See, e.g., Courtney*
7 *v. Colvin*, 2016 WL 3869844, at *2 –*3 (E.D. Cal. July 15, 2016); *Hamblin v. Astrue*, 2009
8 WL 113858, at *2 (C.D. Cal. Jan. 14, 2009) (stating that "[t]he Ninth Circuit has made
9 clear what is required to discount a VA rating – silently, or impliedly, rejecting it does not
10 meet this standard").

11 In *Courtney v. Colvin*, 2016 WL 3869844, at *1 (E.D. Cal. July 15, 2016), the court
12 reversed the Social Security Commissioner's decision and remanded the case for further
13 administrative proceedings. Plaintiff's "sole contention [was] that the ALJ failed to give
14 sufficient reasons for rejecting a determination by the Department of Veterans Affairs
15 ("VA") that plaintiff is disabled." *Id.* The ALJ noted that the "VA and [SSA] criteria for
16 determining disability are not identical," and that he may give "less weight to a VA
17 disability rating," so long as he provides "persuasive, specific, valid reasons for doing so
18 that are supported by the record." *Id.* at *2. The ALJ claimed that he "considered and
19 included most of the identified impairments found in the rating decision and [had]
20 considered such impairments in formulating [plaintiff's] maximum residual functional
21 capacity." *Id.* However, the District Court found "[t]he ALJ's discussion of the VA
22 disability rating was insufficient" because although "the ALJ purported to have read and
23 considered the VA's disability determination, his RFC assessment implicitly rejected the
24 VA's finding that plaintiff's combined mental and physical impairments precluded
25 employment." *Id.* The District Court further explained "the error was not harmless because
26 the ALJ's rejection of the VA disability rating, which is entitled to 'great weight' under
27
28

1 *McCartey*, was not inconsequential to the ultimate nondisability determination.” *Id.*
2 (internal citation omitted).

3 Here, the ALJ purports to have “considered the medical findings and related
4 treatment within the VA records,” but the ALJ “accord[ed] the disability ratings from the
5 VA agency no weight.” [AR 25.] The ALJ, however, acknowledged in his written decision
6 that plaintiff The ALJ implicitly rejected the VA’s finding of plaintiff’s service-connected
7 disability noting that “[a] decision by any agency about disability is based on that agency’s
8 rules and is not binding on the Social Security Administration.” *Id.* The ALJ erred in giving
9 the disability ratings from the VA “no weight” because Ninth Circuit precedent requires
10 the ALJ to give “great weight to a VA determination of disability.” *McCartey*, 298, F.3d
11 at 1075. While the ALJ could have given “less weight” to the VA disability ratings if he
12 had given “persuasive, specific, valid reasons for doing so that are supported by the
13 record,” the ALJ failed to provide any reasons for rejecting the VA’s disability ratings of
14 plaintiff. *Id.*

15 Defendant asserts in the Cross-Motion for Summary Judgment and Opposition to
16 Plaintiff’s Motion for Summary Judgment that “the VA only considered evidence up to
17 April 2013 and June 2013, respectively, in issuing its migraine and cystitis ratings.” [Doc.
18 No. 20-1, at p. 9.] Defendant cites *Valentine, supra*, in support of its contention that “the
19 VA did not consider all the evidence of record before the ALJ, which supported his decision
20 to discount the VA ratings and find Plaintiff was not disabled under the Social Security
21 Act.” *Id.* However, this reason was not articulated by the ALJ in his decision. While a
22 reviewing court may draw specific and legitimate inferences from an ALJ’s decision, a
23 court cannot speculate on the ALJ’s reasoning or make “post hoc rationalizations that
24 attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc.*
25 *Sec. Admin.*, 554 F.3d 1219, 1225-1226 (9th Cir. 2009) (stating that “[l]ong-standing
26 principles of administrative law require us to review the ALJ’s decision based on the
27 reasoning and factual findings offered by the ALJ – not post hac rationalizations that
28 attempt to intuit what the adjudicator may have been thinking”); *Stout v. Comm’r, Social*

1 *Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (stating that the court is “constrained to
2 review the reasons the ALJ asserts” for the denial of benefits and “cannot affirm the
3 decision of an agency on a ground that the agency did not invoke in making its decision”)
4 (quoting *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)); *Pinto v. Massanari*, 249
5 F.3d 840, 847 (9th Cir. 2001). Accordingly, the Commissioner’s post hoc rationalizations
6 do not remedy the ALJ’s legal error in failing to articulate persuasive, specific, valid
7 reasons for rejecting the VA disability ratings.

8 Under the circumstances presented, it was not enough for the ALJ to give “no
9 weight” to the VA’s disability determinations. These detailed findings and conclusions
10 about plaintiff’s medical conditions were not dispositive, as the ALJ stated in this decision,
11 but they were entitled to significant weight.

12 **VI. Conclusion.**

13 A decision to remand for further investigation and development of the record is
14 appropriate when outstanding issues remain that must be resolved before a determination
15 of disability can be made. *Treichler v. Comm’r of Social Sec. Admin.*, 775 F.3d 1090,
16 1106-1107 (9th Cir. 2014); *see also Moisa v. Barnhart*, 367 F.3d 882, 886 (9th Cir. 2004)
17 (“the proper course, except in rare circumstances, is to remand to the agency for additional
18 investigation or explanation”) (internal citation omitted). Based on the foregoing, this
19 Court concludes that a remand for further administrative proceedings is the proper remedy.
20 While a VA disability rating ordinarily is entitled to great weight, it “does not necessarily
21 compel the SSA to reach an identical result,” and it is not clear that social security disability
22 benefits must be awarded in this case. *Hiler v. Astrue*, 687 F.3d 1208, 1211-1212 (9th Cir.
23 2012) (holding that a remand for further administrative proceedings is appropriate where
24 the ALJ deviated from the claimant’s VA disability ratings and gave no reason for doing
25 so). On remand, the ALJ shall develop the record as needed and issue a new decision
26 containing appropriate findings consistent with this Report and Recommendation.

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1 Based on the foregoing, **IT IS HEREBY RECOMMENDED THAT THE**
2 **DISTRICT COURT:**

- 3 1. **GRANT** plaintiff's Motion for Summary Judgment to the extent it seeks a
4 remand for further administrative proceedings [Doc. No. 16];
- 5 2. **DENY** defendant's Cross-Motion for Summary Judgment [Doc. No. 19];
- 6 3. **REMAND** the matter to the SSA for further consideration, investigation, and
7 development of the record consistent with this Report and Recommendation;
8 and,
- 9 4. **ENTER** a judgment in plaintiff's favor remanding this matter for further
10 administrative proceedings.

11 This Report and Recommendation of the undersigned Magistrate Judge is submitted
12 to the United States District Judge assigned to this case, pursuant to the provisions of 28
13 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(d). Within **fourteen (14) days** after being
14 served with a copy of this Report and Recommendation, "any party may serve and file
15 written objections." 28 U.S.C. § 636(b)(1)(B)&(C). The document should be captioned
16 "Objections to Report and Recommendation." The parties are advised that failure to file
17 objections within this specific time may waive the right to raise those objections on appeal
18 of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir.1991).

19 **IT IS SO ORDERED.**

20
21 Dated: May 12, 2017

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23 
24 Hon. Karen S. Crawford
25 United States Magistrate Judge
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